Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

NYNEX / Teleport Arbitration	)	**D.P.U. 96-73/74**
NYNEX / Brooks Fiber Arbitration	)	**D.P.U. 96-75**
NYNEX / AT&T Arbitration	)	**D.P.U. 96-80/81**
NYNEX / MCI Arbitration	)	**D.P.U. 96-83**
NYNEX / Sprint Arbitration	)	**D.P.U. 96-94**

REPLY BRIEF OF
TELEPORT COMMUNICATIONS GROUP, INC.
ON
PRICING FOR UNBUNDLED NETWORK SERVICES
(PHASE III)

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This Reply Brief addresses solely the issues of performance standards and penalties for failing to comply with those standards.

According to NYNEX, the arbitration agreements can only set forth a requirement of parity "between the services it offers its customers and itself and the services it provides to other carriers" (NYNEX Phase III Brief, p. 17). NYNEX claims there is no authority for the Department to impose specific service levels, and that only the requirement of parity can be enforced. This is not correct.

Section 252(c) of the Telecommunications Act requires a State Commission to resolve arbitration disputes and "(1) insure that such resolution and conditions meet the requirements of Section 251..." In turn, Section 251(c)(2) imposes a duty on Incumbent Local Exchange Carriers to provide interconnection "(D) on rates, terms, and conditions that are just, reasonable and non-discriminatory..." The actual terms under which a service or interconnection is provided, including speed of installation and repair, and other indices of service quality, are integral to determining whether the provision of such service is "just and reasonable".

Quality of service is also integrally related to the cost or price for that service, which unquestionably are within the jurisdiction of State Commissions to establish in arbitration agreements.

With respect to the question of parity itself, NYNEX states its willingness to provide monthly management reports pursuant to which each carrier "would receive its own results, the results of its industry in NYNEX's area and the result of NYNEX's end users" (NYNEX Phase III Brief, p. 17). Only aggregate data would be released.

That approach is not acceptable, because it will not allow a true comparison between the service NYNEX provides to a competitor and the service NYNEX provides to its own customers.

As described in detail by TCG's witness John Kelley, NYNEX gives special attention to its largest business customers, including establishing a Business Customer Service Center (BCSC) which serves NYNEX's top 100 revenue producing customers. Each customer served by that office has an assigned account executive and a service account manager. By virtue of their size, and potential revenue, those customers get preferential treatment (Hearing of October 25, TR 75/2).

Because TCG is a participant in the business market, the quality of service it receives from NYNEX must be equivalent to the quality of service NYNEX provides to its best business customers. If NYNEX were obligated merely to provide service to TCG according to its normal service interval, while NYNEX actually provides service to its best business customers in half of that normal interval, TCG will be at an extreme competitive disadvantage. Discrimination of this type would, as a practical matter, exclude TCG from the critical business market.

As NYNEX's witness Julie A. Canny acknowledged, TCG's ability to provide service to its customers was based upon TCG's ability to receive services from NYNEX; if NYNEX failed to provide adequate services to TCG, TCG would be unable to provide adequate service to its own customers (October 23, TR 66/13).

Critically, Ms. Canny also acknowledged that NYNEX was capable of providing a higher grade of service to a particular type of customer, such as a large business customer, compared to all business customers as a group (October 23, TR 68/16). And, on this very issue, NYNEX's witness agreed that the quality of service NYNEX provides to TCG in downtown Boston should be the same quality of service that NYNEX provides to its ten largest business customers (October 23, TR 69/12).

On an overall policy basis, Ms. Canny could not think of any reason why NYNEX should be allowed to treat its largest business customers any better than it treats

Teleport (October 23, TR 69/24).

The only way to assure that TCG does in fact receive the same quality of service as NYNEX provides to its largest business customers is to require reporting of the actual service results for that favored group of business customers. Thus, NYNEX's proposal to report only overall service performance, to all customers as a group, is unacceptable.

In these circumstances, in order to assure parity, TCG (and other carriers) must receive the actual level of service NYNEX delivers to comparable customers, not just compliance with a general standard. And, once the comparable customers are identified, "parity" is not met simply because NYNEX complies with an overall standard. For example, if a standard for installation of a particular service is ten days, NYNEX will be deemed (under existing rules) to be in compliance if it completes 90 or 95% of the installations in that time frame. However, as a practical matter, NYNEX does not complete all of the installations to its own customers on day ten. Instead, some customers may receive service one day after it is ordered, other customers may receive service in three days, and so on (See October 23, TR 57/5).

Thus, for example, if NYNEX does in fact provide service to 25% of its customers by day three, and service to 50% of its customers by day five, then TCG and other carriers are entitled to receive the exact same performance.[1]

With respect to the issue of penalties, NYNEX claims that penalties are not

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[1] MCI's witness Kevin Moss agrees that competitors are entitled to parity with NYNEX's <u>actual</u> experience (October 25, TR 38/1).

mandated by the Act or the Local Competition Order, and that the Department has no authority under Massachusetts Law to impose monetary penalties related to the failure to meet service quality levels.

TCG disagrees with the first assertion, and notes that the Department itself has concluded it has the authority to require liquidated damage provisions to be contained in arbitration agreements. See, Phase I Arbitration Decision, November 8, 1996.

As to the second point, the difficulty which the Department would have in levying fines against NYNEX demonstrates all the more why a self-enforcing liquidated damage provision - as advocated by TCG and other parties - should be included in the arbitration agreements. As the Department found in its Phase I Decision, the only way to assure that NYNEX provides the proper level of service to its competitors "is to introduce financial incentives for NYNEX to perform such services at a comparable level. Liquidated damages provisions certainly provide such an incentive, and there are also other possibilities as well." (Phase I Arbitration Decision, November 8, 1996, at p. 20).

Accordingly, the Department should adopt performance standards and liquidated damage provisions in the Arbitration Agreements as advocated by TCG.

Respectfully submitted,

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